

Friday, 5 September, 1947

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INTERNATIONAL MILITARY TRIBUNAL  
FOR THE FAR EAST  
Chambers of the Tribunal  
War Ministry Building  
Tokyo, Japan

PROCEEDINGS IN CHAMBERS

On

Application on behalf of accused OKA  
for an order for the production of  
two witnesses, FUKUTOME, Shigeru and  
ONADA, Zeitiro;

and

Application on behalf of defense for  
leave to withdraw from the files of the  
Tribunal, Court Exhibits 3053 and 3054.

Before:

HON. WIR WILLIAM WEBB,  
President of the Tribunal  
and Member from the Common-  
wealth of Australia.

Reported by:  
Philip Kapleau  
Court Reporter  
IMTFE

Appearances:

For the Prosecution Section:

Mr. Joseph B. Keenan  
Mr. Solis Horwitz

For the Defense Section:

Mr. S. A. Roberts, Counsel for the  
accused OKA, Takazumi

For the Secretariat:

Mr. Paul M. Lynch, Clerk of the Court

The proceeding was begun at 0905.

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THE PRESIDENT: This is paper No. 1048, an application on behalf of the accused OKA for an order for the production of two witnesses, FUKUTOME, Shigeru and ONODA, Zeiitiro.

Do you appear for the applicant, Mr. Roberts?

MR. ROBERTS: That is correct, Judge.

THE PRESIDENT: You set out in the application where these witnesses are and what you desire them to testify about?

MR. ROBERTS: That is correct.

THE PRESIDENT: Do you desire to add anything to what appears in the application?

MR. ROBERTS: There will be in addition to what is stated here additional information we believe they can give concerning the ultimatum delivered by the United States on November 27 and the note delivered by Japan on December 7 concerning the attitude of SHIMADA and OKA.

THE PRESIDENT: Do you desire to appear in this matter, Mr. Chief of Counsel?

MR. KEENAN: Yes, I do.

Customarily, due to the position taken by the Tribunal on the objection of the defense to the presence

of the prosecution at hearings on applications for defense witnesses, the prosecution has refrained up to this time from appearing at such hearings. However, in view of the fact that the proceedings have just about reached the stage where the defense is about to begin the presentation of the individual defenses of the accused, the present application presents a problem of the utmost importance which will have a grave bearing on the length of this proceeding; and it is urgent that this matter be raised in connection with this application which presents the issue sharply and clearly.

From the opening statements of counsel for the defense and the method of proof used to date, it is clear that the defendants rely on a dual defense. On the one hand they contend that there was no conspiracy and that no substantive offenses were committed; and on the other they contend that whether or not a conspiracy existed or substantive offenses were committed, they, the accused, did not participate in them. During the presentation of the evidence on the phases, the defense has addressed itself to the question of the existence of the conspiracy and the commission of the substantive offenses. They have offered evidence on behalf of all the defendants to

meet every issue raised by the prosecution on this question. The only thing that has not been heard on this first issue is, with one exception, the stories of the accused themselves. It would be natural, therefore, to assume that with the exception of what the accused themselves have to say on the issue of the existence of the conspiracy and the substantive offenses, the individual phases would be limited to the question of the participation of the accused.

However, the present petition discloses the purpose of offering during the individual defenses more evidence in addition to what the accused may have to say on the matter of the existence of the conspiracy and substantive offenses. This can only be repetitious of evidence already fully covered on behalf of all defendants and lead to inordinate prolongation of the trial. It is the prosecution's firm conviction that during the individual defenses, other than what the accused themselves might have to say about the existence of the conspiracy or substantive offenses, no testimony is germane unless it goes to the issue of individual participation.

In view of the importance of the question, involving a matter of policy to be decided by the whole Tribunal, the prosecution feels that action on this

application should be deferred and transferred to the full Tribunal for hearing in open court at an early date. If convenient to the Tribunal the prosecution suggests Wednesday, the 10th of September at 9:30 a. m., or any other suitable hour, of course. We would like to present our views thoroughly and as concisely as possible; and also counsel for the other accused might have some notice if our point is well taken and it deserves consideration at this particular stage.

THE PRESIDENT: Yes.

In the case of ARAKI's application, made this week, I referred the matter to the whole court. Mr. McManus applied. There is a rule made by the Tribunal to the effect that any witnesses for the defense have to be applied for within one month of the close of the prosecution's case, and failing an application within that time, a subpoena would be issued only if special circumstances were shown to exist. But I am not operating on that. I am referring all these matters to the Tribunal. If you would like the Tribunal to hear what you have to say in open court, Mr. Keenan, I of course am only too happy to meet you.

As for the time when we would hear the application, that would be a matter for the Court to decide,



but at present I don't see any objection to the date you fixed.

MR. KEENAN: I might say, Mr. President, that while we think this is basic, as stated in this memorandum I have read, we also feel that, compatible with court procedure, it ought to be attached to something precise before the Court, and we think it is well raised by the issue of asking for a subpoena or the attendance of a witness who, according to the application for FUKUTOME's appearance, this admiral, is asked now to testify during the individual phase of OKA on an operational plan to attack Pearl Harbor.

THE PRESIDENT: Yes, that is very general indeed.

MR. KEENAN: And it had to do with matters that have certainly been before the court and on which the court has made comment as to the possible relevancy of the testimony as tendered already.

THE PRESIDENT: Yes.

MR. KEENAN: We think it attaches to the point that we may have some fair opportunity, on a precise issue on a matter that is before the court to pass upon, to undertake a general understanding of the scope of defense at this peculiar stage. We would like to argue before the whole court so that not one counsel alone

for the accused may be present, but all.

THE PRESIDENT: Yes.

What have you to say, Mr. Roberts?

MR. ROBERTS: This is, as far as the defense is concerned, quite a new departure in attempting to limit the individual defense to the defendants themselves without giving them the right to call witnesses.

THE PRESIDENT: That is not the test. It was made plain that it is only on the general matters to which objection is raised. If you want a witness who can testify to your particular case and he is important enough, he must be heard, of course.

MR. ROBERTS: Under these conditions I admit that there are one or two references in this application that may be general, and we were intending to call these men for those general explanations. However, in this application I am willing to limit it to the defendants and their attitude and their statements concerning the peaceful relations with the United States -- for instance, in the first part of the application.

THE PRESIDENT: That would only put your application in the same position as ARAKI's application for 24 witnesses, and even then I decided to refer it to the whole court at this stage. We will



have to look very closely into the question of whether at this stage it is necessary to call a witness or desirable to call a witness.

MR. ROBERTS: It is my intention to call witnesses who would relate only to my client's actions and not to general actions concerning the general phases.

THE PRESIDENT: As I explained to Mr. Manus the other day, the court should and no doubt will look into the affidavit before deciding whether the witness ought to be heard or not. Copies of the affidavits of course are served on the Judges well before the time when the witness is to be called.

MR. ROBERTS: In this case, however, there is some difference, because the interrogation was taken of these witnesses in Singapore by our investigator, which does not cover everything in detail that we would have liked to cover.

THE PRESIDENT: Yes, I will refer the whole matter to the court.

MR. KEENAN: Mr. President, just before leaving I would like to ask one question. I may not have heard correctly, but if I did, Mr. Roberts stated he was calling these witnesses on account of a note of November 26, 1941, an ultimatum or something of that

nature. Did I understand that correctly?

THE PRESIDENT: It is an American note. It is supposed to be your ultimatum.

MR. KEENAN: I talked with Admiral FUKUTOME early in December, 1945, and what the purpose of the defense would be in calling him to interpret a note of November 26, 1941, escapes my understanding for the moment.

THE PRESIDENT: Well, the matter will be referred to all the Judges.

MR. KEENAN: May we leave now, Mr. President?

THE PRESIDENT: Yes, of course.

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MR. ROBERTS: Perhaps we can dispose of the application on Paper No. 1211 at the same time. It is an application for leave to withdraw from the files of the Tribunal exhibits 3053 and 3054.

THE PRESIDENT: I want to make this subject to no objection being raised by the prosecution. If there is no objection, then the order will issue. I will make the order subject to that condition.

MR. ROBERTS: That will be satisfactory.

(Whereupon, at 0920, the proceeding was concluded.)

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